Lit.

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TOANDOS PENINSULA ASSOCIATION, Appellant, v. JEFFERSON COUNTY; STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES; and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents. and STATE OF WASHINGTON, DEPARTMENT OF FISHERIES, and CONTRACT HARVESTERS ASSOCIATION, INC., Respondents-Intervenors.	SHB No. 91-45 and 91-51 ORDER ON MOTIONS FOR SUMMARY JUDGMENT
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES; and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellants, and STATE OF WASHINGTON, DEPARTMENT OF FISHERIES, Appellant-Intervenor, v. KITSAP COUNTY, Respondent, KITSAP COUNTY LANDOWNERS, Respondent-Intervenor.	

This matter comes forward on cross motions for summary judgment. It is the appeal from the granting of shoreline permits for subtidal geoduck harvesting by Jefferson County to Department of Natural Resources and the denial of same by Kitsap County.

Having considered the following:

1. Motion of Toandos Peninsula Association for Summary Judgment, together with the Declarations of Rob Clark and J. Richard Aramburu in Support of Motion for Summary Judgment.

2. Motion of Respondent Kitsap County for Summary Judgment, with Affidavit of Renee Beam.

3. Ecology's Memorandum in Opposition to Summary Judgment, with Declaration of Donald Peterson in Opposition to Summary Judgment.

4. Natural Resources and Fisheries' Response to Toandos Motions for Summary Judgment Re: Whether Master Programs Complied With WAC 173-16-060(2)(B), with Affidavit of Eric Hurlbert.

5. Motion to Exclude Commissioner to Public Lands Designee due to Appearance of Fairness Doctrine and Conflict of Interest and Memorandum in Support.

6. Natural Resources' and Fisheries' Memorandum in Opposition to Kitsap's Motion to Exclude Commissioner of Public Lands' Designee.

7. Affidavit of Brian Boyle, Commissioner of Public Lands.

8. Natural Resources' and Fisheries' Memorandum in Support of Motion For Summary Judgment To Strike Issue "I" From This Appeal.

Together with the records and files herein and being fully advised, we rule as follows:

Compliance with WAC 173-16-060(2)(b) Regarding Master Program Amendment for Aquaculture. Appellant, Toandos Peninsula Association (TPA), seeks summary judgment reversing the shoreline permits granted by Jefferson County for subtidal geoduck harvesting.

I

As grounds for its motion, TPA urges that the State Department of Ecology did not comply with its regulation, WAC 173-16-060(2)(b) which states in pertinent part:

> *(i) Within one month of the effective date of this regulation, the department of ecology shall notify each local jurisdiction in which major subtidal clam or geoduck beds have been identified by the department of fisheries that a program update will be required. The department of ecology shall provide maps showing the general location of each jurisdiction's major subtidal clam and geoduck beds. The department shall also provide information on subtidal clam and geoduck harvesting techniques, environmental impacts, mitigation measures, and guidance on format and issue coverage for submittal of proposed amendments.*

This Ecology regulation was adopted in 1980. It went on to provide:

> *(ii) Each local jurisdiction with identified major beds shall evaluate the application of its shoreline master program to commercial use of the identified beds. Where necessary, amendments to the master program shall be prepared to better address management and use of the beds. For example, such amendments may be necessary to address newly identified concerns, to coordinate with state wide interests, or to bring policies into conformance with current scientific knowledge.*

II

In 1982, Jefferson County amended its shoreline master program in response to the Ecology regulations. In 1992, TPA challenges Ecology's provision of maps and other information antecedent to Jefferson County's master program amendment. Ecology disputes TPA's challenge. We conclude that TPA is prevented from raising its challenge by the doctrine of laches.

III

The doctrine of laches applies in review of zoning decisions where suit is brought by individuals against owners of nearby property. Buell v. Bremerton, 80 Wn.2d 518, 495 P.2d 1358 (1972). We hold that the doctrine applies with equal force in the circumstances of this case involving amendment to a shoreline master program. The elements of laches, as set out in Buell, are:

> . . . *1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; 2) an unreasonable delay by the plaintiff in commencing that cause of action; 3) damage to defendant resulting from the unreasonable delay.*

The record establishes actual or constructive knowledge by TPA of the 1982 amendment to the Jefferson County Master Program. TPA stipulates that the amendment was made after a public hearing (Motion for Summary Judgment, p. 6, line 3). The amendment was both published in the Jefferson County Master Program and adopted as a state regulation by Ecology. WAC 173-19-240. The record then shows a decade of delay in

bringing the challenge. This constitutes an unreasonable delay. Finally, the delay has damaged the respondent, Department of Natural Resources, by inducing planning and shoreline permit application in reliance on the long standing master program. These elements sustain a bar to TPA's challenge under the doctrine of laches.

IV

Shoreline master programs and amendments thereto must be adopted by Ecology as state regulations under the State Administrative Procedure Act. RCW 90.58.090 and -.120. Both Ecology and Natural Resources cite RCW 34.05.375 which states:

> *No rule proposed after July 1, 1989, is valid unless it is adopted in substantial compliance with RCW 34.05.310 through 34.05.395 . . . No action based upon this section may be maintained to contest the validity of any rule unless it is commenced within two years after the effective date of the rule.* (emphasis added.)

A similar provision applied to rules adopted before July 1, 1989. RCW 34.04.025(5). We conclude that the provision of maps and information required by Ecology's WAC 173-16-060(2) is a requirement in addition to the usual rule adoption procedures of the APA (RCW 34.05.310 through 34.05.395). However, our disposition of the 10-year-old challenge in this case, under the doctrine of laches, is entirely consistent with the 2-year statutory limitation on challenges to the other procedural aspects of master program amendment.

V

Unlike Jefferson County, Kitsap County did not amend its

shoreline master program in response to Ecology's 1980 regulation, WAC 173-16-060(2)(b). An effort to amend was made by Kitsap County which we reviewed, largely on procedural issues, in Kitsap County v. Ecology and Willing, SHB No 83-18 (1983). In that case Kitsap County had submitted master program amendments to Ecology for approval. As these were not satisfactory to Ecology, we sustained Kitsap County's position that it was entitled to make a second submission. To date this has not been achieved. Kitsap County now moves for summary judgment affirmed its denial of shoreline permits for geoduck harvesting on the grounds that Ecology did not comply with its regulation, WAC 173-16-060(2)(b), for amending master programs. Ecology disputes this. We conclude that such a dispute is immaterial to the resolution of this case. The gravamen of Kitsap's position is that because its master program was not amended, no geoduck harvesting may be approved. Yet there is nothing in WAC 173-16-060(2)(b) which would suggest that if amendmnet does not occur the existing provisions of the master program or shoreline management act are in any way affected. Thus the propriety of geoduck harvesting must be determined at trial under the long standing provisions of the Act and existing Kitsap County Master Program.

VI

The motions by TPA and Kitsap County for summary judgment based on compliance with WAC 173-16-060(2)(b) regarding master program amendment for aquaculture should be denied.

Commissioner of Public Lands Designee.

Respondent, Kitsap County, moves to exclude the Commissioner of Public Lands or his designee from this matter under the appearance of fairness and conflict of interest doctrines.

I

The Shoreline Management Act provides for the composition of the Board at RCW 90.58.170:

> *. . . The shorelines hearings board shall be made up of six members. Three members shall be members of the pollution control hearings board; two members, one appointed by the association of Washington cities, and one appointed by the association of county commissioners, both to serve at the pleasure of the associations; and the commissioner of public lands or his designee . . .*

II

The standard for reviewing whether the appearance of fairness doctrine has been violated is:

> *Would the hearing appear fair to a reasonably prudent and disinterested person who had been apprised of the totality of the circumstances? Smith v. Skagit County, 75 Wn.2d 715, 741, 453 P.2d 832 (1969).*

III

Kitsap County correctly points out that its opposite in this litigation is the Department of Natural Resources; that the administrator of Natural Resources is the Commissioner of Public Lands, RCW 43.30.050; and that the Commissioner of Public Lands or his designee sits as one of six members on the Shorelines Hearings Board.

Yet this is not the totality of the circumstances. In this case the Commissioner of Public Lands has designated Ms. Nancy Burnett to sit on the Board. We take notice, also, that Ms. Burnett is also designated by the Commissioner of Public Lands to sit on the Energy Facility Site Evaluation Council. In his uncontroverted affidavit, the Commissioner of Public Lands declares:

> *"Neither I nor anyone else in DNR sits in review of Ms. Burnett's actions on the Board."*
>
> *and*
>
> *"Neither I nor anyone in DNR has any contact with Ms. Burnett concerning any of the acitivities of DNR, particularly with respect to cases which are pending before the Board."*

In the totality of these circumstances, we conclude that the hearing would appear fair to a reasonably prudent and disinterested person.

IV

We address this issue as a full panel because the appearance of fairness issue is directed at the statutory composition of the Board. There has been no contention that Ms. Burnett has any personal interest in the outcome of this case. We have been cited to no authority, and know of none where the statutory composition of a board, alone, constituted a violation of the appearance of fairness or conflict of interest doctrines.

V

Kitsap County's motion to exclude the Commissioner of Public Land's designee from this matter should be denied.

Issue "I" Regarding Dismissal for Failure to Join an Indispensible Party.

Appellants, Department of Natural Resources and Department of Fisheries, move to strike issue "I" of the Pre-Hearing Order which is:

> *Whether this appeal should be dismissed for failure of appellant to name as an indispensible party to the litigation the City of Winslow?*

There was no opposition filed in reply to this motion.

VI

Each of the shoreline applications for geoduck harvesting at issue, within the outer boundaries of Kitsap County, were made by Natural Resources to Kitsap County which denied them. The above issue "I" seeks dismissal on the premise that the City of Winslow (Bainbridge) perhaps should have been the recipient of Natural Resources' applications, if any, within its limits. Whether this is so is another issue, denominated "H" in the Pre-Hearing Order. No resolution of perogative between the County and City can justify dismissal of Natural Resource's pending appeals. If the City was not the appropriate decision maker then the case can proceed as the City is not indispensible. If the City was the appropriate decision maker then only those applications for sites within City limits would be affected. The other Kitsap County applications would not. As to applications within the City the proper remedy where the City must decide is to remand the applications for City consideration and not to dismiss on grounds of failure to name a party.

VII

The motion of the Department of Natural Resources and the Department of Fisheries to strike issue "I" regarding failure to join an indispensible party should be granted.

ORDER

1. The motion by Toandos Peninsula Association and Kitsap County for summary judgment based on compliance with WAC 173-16-060(2)(b) are hereby denied.

2. The motion by Kitsap County to exclude the Commissioner of Public Land's designee from this matter is hereby denied.

3. The motion by the Department of Natural Resources and the Department of Fisheries to strike issue "I" of the Pre-Hearing Order relating to failure to join an indispensible party is hereby granted.

DONE at Lacey, WA, this 21st day of February, 1992.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

(See Partial Concurrence and Dissent)

JUDITH A. BENDOR, Attorney Member

ANNETTE S. McGEE, Member

NANCY BURNETT, Member

DAVE WOLFENBARGER, Member

WILLIAM A. HARRISON
Administrative Appeals Judge